

20120239

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Carol J. Johnson, ) Supreme Court No. 20120239  
)  
Plaintiff/Appellant, ) District Court No. 09-2009-C-2892-1  
)  
-vs- )  
)  
Natalya Bronson, M.D.; Prairie )  
St. John's Fargo, LLC, dba )  
Prairie St. John's Hospital; )  
B.R. Clark, R.N., Steven )  
Mottinger; John Does 1-100; )  
Jane Does 1-100, )  
)  
Defendants/Appellees. )

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

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**BRIEF OF DEFENDANT/APPELLEE STEVEN MOTTINGER**

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APPEAL FROM THE APRIL 2, 2012, JUDGMENT AND  
MEMORANDUM DECISION AND ORDER DATED JULY 18, 2012,  
DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF  
SUMMARY JUDGMENT DECISION AND ORDER

THE HONORABLE M. RICHARD GEIGER  
DISTRICT COURT OF CASS COUNTY  
CIVIL NO. 9-2009-C-2892-1

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## **STATEMENT OF THE ISSUES**

1. Whether the district court properly granted the motions for summary judgment as a matter of law in favor of Attorney Mottinger based upon the failure of Plaintiff Johnson to establish essential elements of her causes of action against him.

2. Whether the district court abused its discretion in denying the motion for reconsideration when Plaintiff Johnson did not identify the grounds for her motion, as it related to Attorney Mottinger, or any exceptional circumstances for her attempted late submission of a supplemental expert opinion.

3. Whether the district court abused its discretion in granting the motion in limine that precluded Plaintiff Johnson from testifying as a legal expert in this case when Plaintiff Johnson had failed to disclose herself as an expert and did not qualify as an expert under North Dakota law.

## **STATEMENT OF THE CASE**

This is an appeal from judgment entered against Plaintiff and Appellant Carol Johnson [“Johnson”] in favor of Attorney Steven Mottinger [“Mottinger”] based upon a March 20, 2012, order which granted motions for summary judgment in favor of Mottinger and denied summary judgment to Johnson. (See Appellant Brief; Doc. ID# 381.) Appellant Johnson also raises several issues on appeal regarding other motions made to the district court. (See Appellant Brief.) She appeals the ruling on a motion by Mottinger to exclude testimony from Johnson, herself, as a proposed expert and the denial of her motion for reconsideration of the motions for summary judgment which was also denied. (See Appellant Brief; Doc ID# 382.)

Attorney Mottinger represented Johnson at a Preliminary Hearing for Involuntary Commitment which took place on July 20, 2007, at a time set by the district court. (See Mott. App. at 0015-0034.) The petition was initiated by Prairie St. John’s and was prosecuted by the Cass County State’s Attorney’s Office.

Mottinger had been contacted to represent Johnson late in the afternoon on July 19, 2007. Mottinger arrived early to meet Johnson to discuss the contents of the petition for involuntary commitment. Johnson



refused to speak with Mottinger because he was emitting an “electronic hazard.” The preliminary hearing proceeded notwithstanding this refusal.

Johnson’s concern regarding “electronic hazards” is what led her to visit Prairie St. John’s at the urging of the Fargo Police Department. (Doc. ID# 381 at p. 4.) She strongly believed that these “electronic hazards” were the product of illegal activities. After voluntarily visiting Prairie St. John’s, Johnson was held involuntarily upon order of a staff psychiatrist. Id.

During the Preliminary Hearing on the Involuntary Commitment, Mottinger questioned Dr. Natalya Bronson, the Petitioner, regarding the statutory requirements to hold Johnson for an involuntary commitment. (Mott. App. at p. 0022-0024.) Dr. Bronson testified under cross-examination by Mottinger that Johnson was not a harm to herself, others, or other people’s property, which is required to involuntarily hold her under N.D.C.C. § 25-03.1-17. Id. at p. 0022-0023. The district court found that probable cause existed for Johnson to be involuntarily held until the involuntary commitment hearing which would be conducted pursuant to the language of N.D.C.C. § 25-03.1-19. Id. at p. 0031-0032. Johnson was released by Prairie St. John’s against medical advice by written petition dated July 24, 2007. (Doc. ID# 286.)

Johnson, thereafter, brought a claim against Mottinger for legal negligence in his representation of her at the Preliminary Hearing on July 20, 2007. (Doc. ID# 1.) Following the initial complaint, she also attempted to assert additional causes of action against Mottinger for intentional infliction of emotional distress, negligent infliction of emotional distress and false imprisonment. (Doc. ID# 244 at p. 35-44.)

In accordance with the discovery schedule, Johnson disclosed her experts. (Doc. ID# 152, 172.) She listed one legal expert, Attorney Gregory Runge. (Doc. ID# 152 at p. 4-5.) When deposed, Runge stated that he would not be opining as to the issues of causation and damages. Mottinger thereafter brought a motion in limine to prevent Johnson from attempting to offer herself as an expert on the standard of care for an attorney in North Dakota handling involuntary commitments. (Doc. ID# 301.) The motion in limine was granted. (Doc. ID# 382.)

Mottinger then brought a Motion for Partial Summary Judgment against Johnson for the claim of legal negligence because Johnson failed to reveal any expert testimony which would establish the element of causation necessary for her prima facie case. (Doc. ID# 237.) Johnson responded with a contrasting Motion for Summary Judgment wherein she argued that

she could establish causation and also attempted to assert three additional causes of action against Mottinger. (Doc. ID# 244.) Mottinger responded to Johnson's Motion for Summary Judgment and also joined the Medical Defendant's Motion for Summary Judgment on the claims for intentional infliction of emotional distress, negligent infliction of emotional distress and false imprisonment. (Doc. ID# 312, 314.) The district court granted the motions for summary judgment in favor of Mottinger and denied the motion for summary judgment in favor of Johnson. (Doc. ID# 381.)

Plaintiff Johnson immediately asked the district court to reconsider its ruling. (Doc. ID# 400.) Along with her Motion for Reconsideration, Johnson submitted a substantially revised affidavit from her legal expert, Runge, which was a direct response to the district court's written memorandum decision on the motions for summary judgment and which directly contradicted his deposition testimony. (See Doc. ID# 401.) Runge now asserted that he would opine regarding causation and damages. Id. The motion for reconsideration was denied because no explanation was offered why the information contained within the new affidavit was not offered while the motions for summary judgment were under consideration. (Doc. ID# 445.)

Johnson now appeals the Judgment of the district court and the denial of the Motion for Reconsideration. (Appellant Brief.) Within her appeal, Johnson takes a shotgun approach and reargues every issue upon which the district court ruled against her. Id. Mottinger requests this Court to affirm the district court's judgment and rulings.

## **STATEMENT OF THE FACTS**

### **I. The Facts of the Underlying Case Relating to the Preliminary Hearing on the Involuntary Commitment of Carol Johnson.**

On July 18, 2007, Plaintiff Johnson experienced what she termed an “electronic hazard,” something she had encountered on many occasions in the past. (Doc. ID# 381 at p. 4.) Johnson has been unable to define what an “electronic hazard” is or what causes it to occur:

Q: Okay. Can you describe for me what that is?

A: As Eric said, I have describe it as creating a feeling of fatigue, great mental, emotionally and physical fatigue. I initially described it when I first felt it a being an air pressure situation. There was something wrong with the air pressure. I’m quite sure that’s how I initially described it. There is something wrong with the air pressure.

Q: Was it something that you can physically see?

A: No.

Q: Not an aura or anything that you can visually see?

A: No.

Q: Is it something that you can hear?

A: No, not that I’m aware of.

\* \* \*

Q: And how is that you know where that sensation is coming from?

A: It's a certainty. I can sense it just as I have explained. If I'm seated in front of a fan, just an air fan, and the blades are going around I can feel the sensory perception on my skin of the air, the draft of air. That's a sensory perception. You can't see it. You can't feel it – I mean you can't see if, you can't hear it, but you can with certainly perceive that that is a sensory perception on your skin. In the same fashion when I am in the approximate vicinity of what I have termed to be, for want of a better term, an electronic hazard device, I can perceive it. I can sense it.

Q: And what is an electronic hazard device?

A: I don't know what that is.

(Mott. App. at p. 0065, l. 8-25; p. 0066, l. 3-18.)

Johnson believes that the “electronic hazards” that she experiences are, and were, the result of illegal activity. Johnson reported the most recent incident to the Fargo Police Department, just as she had done numerous times to other law enforcement, including the North Dakota Attorney General's Office. (See Doc. ID# 381 at p. 4.)

The Fargo Police were unable to assist with the “electronic hazard” issue, but were concerned for her. (See Doc. ID# 381 at p. 4.) The police contacted Carol Johnson's son, Eric Lundberg, and suggested that Lundberg

encourage his mother to visit Prairie St. John's ["Prairie"], a local psychiatric hospital in Fargo, North Dakota, or something similar. Id.

Later that same day, Lundberg having convinced his mother to seek assistance, took Johnson to Prairie. Id. At the end of what both believed, or what they later testified, was to be an informational visit, Johnson was taken into protective custody against her will at the directive of Prairie through a staff psychiatrist. See id.

On July 19, 2007, a petition for involuntary commitment of Johnson was filed in Cass County District Court after being signed by Dr. Natalya Bronson ["Dr. Bronson"] and after having been approved by the Cass County States' Attorneys Office. Id. The petition was in a form consistent with North Dakota law and was ultimately reviewed by District Judge Steve Marquart. Attorney Mottinger was contacted to represent Johnson in the involuntary commitment proceedings. (Doc. ID# 381 at p. 5.)

Mottinger was not contacted until late in the day on July 19, 2007. Since the involuntary commitment hearings in Cass County District Court are scheduled for a day certain each week, Friday, Mottinger was aware that the Preliminary Hearing would be the next morning.

Prior to the hearing, Mottinger met with Johnson and attempted to discuss the content of the petition with her. (Doc. ID# 322 at p. 9, l. 11- p. 10, l. 10.) Johnson refused to speak with him. Id. Johnson believed Mottinger was emitting an illegal “electronic hazard.” Id. The preliminary hearing went forward on July 20, 2007, pursuant to the language of N.D.C.C. § 25-03.1-17. (See Mott. App. At p. 0015-0034.)

As dictated by statute the July 20, 2007 preliminary hearing was to determine whether probable cause existed to conclude that Johnson was a person requiring treatment under N.D.C.C. Chapter 25-03.1. Id. At the hearing, Dr. Bronson, the petitioner, was called by the State’s Attorney to testify regarding Johnson’s mental health and her need for treatment. Id. at p. 0018-0022. During direct examination, Dr. Bronson testified that she believed Johnson was mentally ill, that she required medical treatment, and recommended she be held for treatment for a period of 14 days. Id. at p. 0022-0023. On cross-examination, Mottinger established that, Dr. Bronson did not believe Johnson posed a threat of harm to herself or others (one of the criteria of the statute to be considered by the court):

Q: Be that as it may, let’s assume that she is, for purposes of this discussion right now, mentally ill. Do you believe that she is a danger to other people?



A: She does not.

Q: Do you believe that she's likely to intentionally harm herself?

A: At this point, no.

Q: Do you believe she's a danger to other people's property?

A: At this point, no.

Q: Assuming that's the case, why is it so important to hospitalize her at the present time?

A: I believe that substantial deterioration in her mental and physical health can lead to, in the future, to possible harm of self, like by neglecting her mental health and her physical condition because she has no insight.

Id. at p. 0022, l. 21- p. 0023, l. 11.

Based on that opinion, after the petitioner (the Cass County State's Attorney) rested, Mottinger moved for a directed verdict:

Accepting Dr. Bronson's testimony at face value, I think the court could conclude that Carol Johnson does suffer from a mental illness, however, I don't believe the State has made the requisite burden of proof that that mental illness is so severe and so advanced at this point that it impacts her ability to care for herself. Dr. Bronson was quite clear that she's not a danger to other people, other people's property, there's no history of suicidal attempts. The mere fact that at some point down the road her condition may deteriorate is not, in my estimation, enough to meet the burden of proof required.

We, therefore, ask the Court to dismiss the Petition.

Id. at p. 0024, l. 4-16.

The motion was denied. Therefore, Mottinger called Johnson to testify on her own behalf. (See Mott. App. at p. 0025.) Johnson testified regarding the circumstances which caused her to contact the Fargo Police Department, the “electronic hazard.” Id. at p. 0028, l. 4-14. At the conclusion of the preliminary hearing, Judge Marquart observed:

Well, it doesn't take a whole lot. It's probable cause. And so the court does find that there is probable cause to believe that the Respondent is a mentally ill person with a diagnosis of a delusional disorder and the Court finds there is probable cause to believe, primarily from the Doctor's testimony that, if this matter is not taken care of with treatment, that there is a substantial – a risk of substantial deterioration both in her physical health and her mental health. And the Court also finds by probable cause that there really is no alternative source of treatment available at this time.

So the Court will order then inpatient treatment for a period of up to 14 days.

(Id. at p. 0031, l. 15- p. 0032, l. 9.)

Following the dictates of the Preliminary Hearing Order, Johnson was returned to Prairie St. John's custody for treatment. (Doc. ID# 381 at p. 8.) She remained there the following weekend, but was released on July 24, 2007, upon motion of Prairie St. John's and against medical advice. Id. at p. 9. The release stated:

[Patient] is not following the recommendations of the treatment team and refusing to do [outpatient] follow up, but [patient] is

not gravely disabled, a danger to herself, or danger to others at this time, so we are discharging her against medical advice.

(Doc. ID# 286.)

The reason for Johnson's release was the same argument Mottinger had made during the Preliminary Hearing. (Cf. Mott. App. at p. 0022, l. 21-p. 0023, l. 5; p. 0031, l. 15-21.) Johnson was released prior to any further hearings on her mental status, specifically a treatment hearing she would have been entitled to under N.D.C.C. § 25-03.1-19. (Doc. ID# 381 at p. 9.)

**II. The Facts Regarding the Litigation Against Attorney Mottinger for Johnson's Allegations of Legal Negligence and Other Causes of Action Johnson has Attempted to Assert.**

**A. The Facts Contained Within the Pleadings, Depositions, and Expert Disclosures.**

In July, 2009, Johnson initiated a lawsuit against, among others, Attorney Mottinger. (See Doc. ID# 1, 5.) In the initial Complaint, Johnson asserted nine causes of action against various individuals and Prairie, but only one cause of action for legal malpractice against Mottinger. (Doc. ID# 1.) It was clear that most of the allegations within the Complaint were directed at Prairie, its doctors and employees ["Medical Defendants"], and not Mottinger. See id. During her deposition, when asked which of the

allegations within the Second Amended Complaint were being made against Mottinger, she stated:

Q: Now with respect to Steve Mottinger specifically I think we've identified there's one telephone conversation that you had with Mr. Mottinger and one personal meeting that you had with him prior to the hearing process itself. And the Complaint itself am I correct that Paragraph 10 of your Second Amended Complaint is the allegation against Steve Mottinger?

A: Yes.

Q: You drafted that a number of times. And I assume you are familiar with it?

A: Yes.

Q: I can get a copy of it if you want. But it's clear that's the one cause of action against Mr. Mottinger?

A: Yes.

(Mott. App. at p. 0068, l. 4-19.)

In accordance with the Rule 16, N.D. R. Civ. P., Scheduling Order in this case, Johnson designated her expert witnesses on January 14, 2011. (Doc. ID# 152.) The only designated legal expert against Mottinger was Bismarck attorney, Gregory Runge. Id. at p. 4-5. Johnson made a written declaration that Runge was expected to testify regarding the standard of care for representation in North Dakota in an involuntary mental health

commitment proceeding. Id. Runge was also expected to testify about the “causal relationship between the injuries sustained in the 2007 incident and the legal representation that was rendered to her.” Id.

The Rule 16 Scheduling Order was later amended, (Doc. ID# 228), and Johnson disclosed additional experts in accordance with the Amended Scheduling Order. (Doc. ID# 172.) Johnson did not list any additional legal experts in her subsequent expert disclosure. (See Doc. ID# 172.)

The gist of the proposed testimony of Runge was first that Mottinger could have asked more questions to persuade the court to rule other than the way he did, and second that he should have requested a delay in the preliminary hearing so as to allow him to retain a psychiatric expert to support his argument that Johnson was not mentally ill and did not require treatment. (See Mott. App. at p. 0036, l. 18- p. 0037, l. 22.) The reality was that the Preliminary Hearing was July 20, 2007, and Johnson was released July 24, 2007.

The deposition of proposed legal expert, Runge, was taken March 29, 2011. In his deposition, Runge was questioned on his opinions regarding the elements of the alleged legal malpractice claim against Mottinger:

Q: What about the causation part? There's going to be a discussion in this case of causation that is a damage. Are you opining as to a damage in this case?

A: No. I don't know what the damages are.

Q: You're not going to get to this point – you know, it's the old – go back to tort class. It was Larry Kraft for me. Maybe he was still there when you were there. You know, you have to find a duty, a violation of a duty, and a causal relationship. You're kind of at the duty and violation of duty. You don't get to the causation?

A: No.

Q: Fair enough. And that takes out a bunch of questions, because I don't want to get into this. You've not opined as to any damage that has been sustained here?

A: No.

Q: Nor causal relationship between conduct—

A: I can't – between causal relationship and the damage, no, I can't.

Q: Fair enough. Now, there's also this, and I need to clear this up. Furthermore this expert witness is expected to testify as to the breach of the legal defendant's fiduciary duty. And that's a real operative term for lawyers. Are you opining as to fiduciary duty?

A: You'd have to define - - I don't' know what a fiduciary duty is between an attorney and - - other than money.

Q: I don't know either.

A: So I can't opine on that.

(Mott. App. at p. 0040, l. 22 - p. 0042, l. 3.)

In addition to refusing to opine on the issues of causation and damages within his deposition, Runge also could not, and did not, opine to a reasonable degree of legal certainty that if Mottinger had acted in the manner that Runge thought was appropriate that the probable cause hearing would have had a different outcome:

Q: Well, because the Judge exercises his discretion to rule in favor of the petitioner for this involuntary commitment, that's not in and of itself evidence of legal negligence by Steve Mottinger?

A: No, it's not.

Q: And we've gone down that lane a little bit here.

A: Yes.

Q: We've all been in cases we've lost and we know that that happens.

A: Yes.

Q: Well, is there any way for you to state to a reasonable degree to legal certainty that even had Steve Mottinger examined in the manner that you suggest he should have, that is, examined Dr. Bronson in the manner you suggest he should have, that the Judge in this case, Judge Marquart, would have exercised his discretion differently?

A: I cannot say that, no. I cannot.

Q: Likewise, with his handling of Ms. Johnson on the witness stand, can you state to a reasonable degree of medical - - or legal certainty that even had he examined Ms. Johnson in the manner that you suggest he should have, that that would have caused Judge Marquart to rule differently or exercise his discretion differently? Can you state that to any degree of legal certainty?

A: I can't, because it's probable cause. I can't.

Q: And that is the problem we face here, isn't it?

A: Yeah.

(Mott. App. at p. 0038, l. 25 – p. 0040, l. 7.)

Johnson was asked whether her disclosure of proposed expert, Runge, was complete. (Mott. App. at p. 0070, l. 20- p. 0072, l. 14.) She conceded that she did request that Runge put in writing his complete opinion as to how Mottinger had failed to meet the standard of care of lawyers practicing in North Dakota. Id. at p. 0070, l.20- p. 0072, l. 14. She also conceded that there had been no supplementation of that proposed opinion. Id. at p. 0069, l. 11-16; p. 0071, l. 8-14. She also agreed that the deposition taken of Runge was the complete opinion of her expert and would be what she would offer at trial. Id. at p. 0071, l. 15 – p. 0072, l. 19.



**B. The Facts Contained Within the Multiple Motions for Summary Judgment and the Motion for Reconsideration.**

Mottinger served a Motion for Partial Summary Judgment on November 30, 2011. (Doc. ID# 237, 242.) The motion was premised on the legal reality that given the lack of expert testimony on causation and damages Johnson could not establish a prima facie case for legal negligence or for breach of fiduciary duty. (Doc. ID# 237 at p. 11-14.) In support of his motion, Mottinger attached the affidavit of his legal expert, Thomas A. Dickson, who opined that “none of the alleged errors committed by Steven Mottinger were causative of any damage to Carol Johnson, and, thus, the elements of a legal negligence action cannot and have not been met under these circumstances.” (Mott. App. at p. 0043-0063.) Johnson did not depose expert Dickson.

Johnson responded to the Partial Summary Judgment Motion by attempting to expand the scope of Runge’s deposition testimony to address the element of causation without including new affidavits or pointing to contradictory testimony from Runge’s deposition. (See Doc. ID # 244.) As she was prone to do in this litigation, rather than cite specific deposition testimony to support her proposed position, Johnson simply alleged her “argument” as fact in an affidavit from herself. (See Doc ID# 250.) She did

not submit a new affidavit from her expert, Runge, at that point. Even at the hearing on the motions for summary judgment, Johnson did not offer new affidavits from Runge, nor did she suggest in argument that his opinion would change.

In addition to responding to Mottinger's Motion for Partial Summary Judgment, Johnson submitted a Motion for Summary Judgment. (Doc ID# 244.) In her Motion, Johnson attempted to apply some of the other causes of action in her Second Amended Complaint to Mottinger, including claims for false imprisonment, negligent infliction of emotional distress and intentional infliction of emotional distress. Id. at p. 35-44.

After these cross-motions for summary judgment were served, the Medical Defendants served their Motions for Summary Judgment against Johnson. (Doc. ID# 267-278.) Among these motions, the Medical Defendants filed motions for summary judgment on Johnson's alleged economic damages, (Doc. ID# 269-70), on her alleged non-economic damages, (Doc. ID# 271-72), and one combined motion on the causes of action for false imprisonment, negligent infliction of emotional distress, and intentional infliction of emotional distress, (Doc. ID# 267-68). These three

motions for summary judgment were joined by Mottinger. (Doc. ID# 310-12.)

In addition to the joining the Medical Defendant's motion for summary judgment on the claims for false imprisonment, negligent infliction of emotional distress and intentional infliction of emotional distress, Mottinger addressed these additional causes of action in a brief in opposition to Johnson's motion for summary judgment against him. (Doc. ID# 314 at p. 18-20.) It was again argued that Johnson did not establish the essential elements of these additional causes of action as they related to Mottinger: both the intent and unlawfulness in the claim for false imprisonment; both the intent and the "extreme and outrageous conduct" for the claim of intentional infliction of emotional distress; and the bodily harm for the claim of negligent infliction of emotional distress. Id. Johnson's reply brief did not supply additional facts, either through affidavit or identifying deposition pages, indicating that the existence of these elements. (See Doc. ID# 321 at p. 16-20.)

Within its Memoranda Decision and Order, the district court granted Mottinger's motion for partial summary judgment, denied Johnson's motion for summary judgment and also denied Johnson's motion to file a third

amended complaint. (Doc. ID# 381.) The district court held that Johnson was required under North Dakota law to establish causation for the claim of legal negligence through expert testimony. Id. at p. 12. The district court observed that Runge, the only legal expert declared by Johnson, conceded that he was unable to opine that a causal connection existed between the acts or omissions of Mottinger and Johnson's alleged damages. Id. at 18. In contrast, the uncontroverted expert evidence from Attorney Dickson affirmatively stated that the alleged errors by Mottinger (questions not asked in the preliminary hearing), did not cause damage to Johnson. Id. at p. 13. The district court thus concluded that Mottinger was entitled to relief from the Tenth Cause of Action for legal malpractice. Id. at p. 20.

As to the additional causes of action Johnson hoped to assert against Mottinger, the district court held that the doctrine of judicial estoppel precluded Johnson from asserting three additional causes of action against Mottinger after Johnson had been specifically asked in her deposition what was being claimed against him and she identified only Count Ten, Legal Malpractice. With respect to the claim for intentional infliction of emotional distress, the district court found that Johnson had failed to produce evidence from which one could reasonably infer that Mottinger had intentionally or

recklessly caused Johnson emotional distress. (Doc. ID# 381 at p. 23.) The district court also held that Johnson had not produced any competent evidence that she had suffered any bodily harm required to establish a claim for negligent infliction of emotional distress. Id. As to the cause of action for false imprisonment, the district court stated that Johnson had set forth insufficient facts to establish that Mottinger had intended for Johnson to be held at the Prairie St. John's facility. Id.

By its Memoranda Decision, the district court also made clear that it was ruling on Mottinger's motions for summary judgment as well as the motion for summary judgment made by Johnson. (Doc. ID# 381.) After granting all of Mottinger's motions for summary judgment, the district court held that Johnson's motion for summary judgment against Mottinger was, in all things, denied. (Doc. ID# 381 at p. 38.)

Following the district court's Memoranda Decision and Order and after digesting its impact, Johnson moved the district court for reconsideration of the motions for summary judgment with a 108 page brief in support of the motion. (Doc. ID# 399-400.) Within her motion, Johnson reargued numerous issues that had arisen during the course of litigation and submitted new "evidence" along with her motion, specifically a new

affidavit of Attorney Runge which clearly resulted from his review of the district court's memorandum opinion. (Doc. ID# 400 at p. 2; Doc. ID# 401.) The proposed opinion changed and attempted to accommodate and address the clear inadequacies cited by the district court in the prima facie case offered by Johnson. (See Doc. ID# 400 at p. 2; Doc. ID# 401.) The new affidavit was an "about face" opinion on causation and damages. (See Doc. ID# 401.) The next day, Johnson filed a notice of appeal of the motions for summary judgment. (Doc. ID# 426.)

Mottinger responded procedurally to the motion for reconsideration by filing an objection to the motion, but stated that he would not be submitting a responsive brief unless directed to do so by the district court because the notice of appeal had divested the district court of jurisdiction. (Doc. ID# 429.) The district court declined consideration of the motion because it lacked jurisdiction. (Doc. ID# 431.) This Court remanded the matter for the limited purpose of allowing the district court to consider the motion for reconsideration. (Doc. ID# 432.)

As a result of those Orders, Mottinger filed a memorandum in opposition to the motion for reconsideration. (Doc. ID# 435.) It was pointed out that Runge's new affidavit was in direct contradiction to his

prior sworn deposition testimony and that Johnson did not explain why new evidence was being submitted with her motion for reconsideration. Id. at p. 6-12. It was clear the affidavit was drafted in direct response to the ruling of the district court, essentially a statement by Runge that he disagreed with the ruling of the district court. (See Doc. ID# 401.) Runge added new opinions to fill the evidentiary deficiencies found by the district court in the prima facie case offered by Johnson. Id.

When Johnson replied to Mottinger's memorandum in opposition to the motion, Johnson did not attempt to explain to the district court why Runge' new opinion was being offered at that time or, more importantly, why it could not have been offered at an earlier point in the proceedings. (Doc. ID# 441 at p. 10-17.) The district court ruled that Johnson failed to set forth any facts or circumstances through her affidavits or arguments that provided a sufficient reason under Rule 60(b), N.D.R. Civ. P., to justify a reconsideration and reversal of the orders for summary judgment. (Doc. ID# 445 at p. 3-4.)

Johnson now asks this Court to reverse the district court's ruling granting Mottinger's motion for summary judgment based on Runge's change of opinion which followed the original ruling of the district court.

(Appellant's Brief at p. 31-33; see also Doc. ID# 401.) Even here, Johnson makes no effort to explain why she could not have otherwise submitted evidence on the element of causation until after she had already lost her case and read the reasons why she lost. (Appellant's Brief at p. 31-33.) She makes no new legal arguments with regard to the claims asserted against Mottinger. Id. It is her proposed expert testimony that she attempts to modify. See id.

**C. The Facts Contained Within the Motion in Limine Regarding Expert Testimony.**

While the briefs on the motions for summary judgment were being submitted, Mottinger also submitted a motion in limine on December 16, 2011, under Rule 3.2 of the North Dakota Rules of Court. (Doc. ID# 299, 301.) The motion in limine included a request to exclude Johnson from testifying as a legal expert regarding Mottinger's conduct. (Doc. ID# 301 at p. 4-7.)

On January 9, 2012, six (6) days after a brief in opposition to the motion in limine would have been due, Johnson filed a motion seeking an extension of time to file a response. (See Doc. ID# 319.) Within her request for an extension, Johnson acknowledged that her response was untimely. Id. at p. 2. Mottinger opposed the request for an extension of time. (Doc. ID#



325.) Despite the acknowledgement that her responsive brief was past due, Johnson filed a memorandum in opposition to Mottinger's motion in limine. (Doc. ID# 328.) Within that memorandum, Johnson did not provide supplemental expert testimony. See id. Instead, Johnson urged the district court to rule on a case-by-case basis regarding the testimony of Greg Runge and argued that she, herself, should also be permitted to testify as an expert in the case opining as to the standard of care of an attorney in North Dakota, notwithstanding the fact that she has never been licensed to practice law in North Dakota. Id. at p. 2.

On January 18, 2012, the district court denied Johnson's request for an extension of time to respond to Mottinger's motion in limine. (Doc. ID# 340.) Based upon Rule 3.2, N.D.R.Ct., the district court chastised Johnson for her failure to comply with the timing requirements and held that Johnson's failure respond in a timely manner meant that she agreed with the positions asserted by Mottinger. Id. at p. 2.

In a separate Memorandum Decision, the district court considered Mottinger's motion in limine on the merits and granted the motion. (Doc. ID# 341.) The court stated that the failure to list herself as an expert, and a failure comply with the expert disclosure requirements in the Rule 16

Scheduling Order, was enough to grant the motion to exclude Plaintiff Carol Johnson as an expert. Id. at p. 3. The district court also held that Johnson did not meet the foundational requirements necessary to be considered as an expert in this case under Rule 702, N.D.R. Evid. Id. at p. 3-4. The court stated that expert testimony would be needed to establish the element of causation because the matters were beyond the knowledge of a lay witness as a result of the complexity of involuntary commitment proceedings. Id. at p. 2-3.

On appeal, Johnson asks this Court to reverse the district court's ruling on the motion in limine. (Appellant's Brief at p. 41-42) She identifies that the standard on appeal for reviewing a motion in limine is an abuse of discretion standard; however, Johnson makes no effort to identify how the district court abused its discretion in precluding her from testifying as an expert witness. Id.

**D. The Case History of Numerous Motions, Extensive Briefing and Continuous Delays.**

There have been over 425 filings in this case spanning over the last three years. The scheduling order was amended once and the complaint was amended twice. (See Doc. ID# 1, 91, 141, 164, 228.) The briefing on the motions has been lengthy and abusive. (See e.g., Doc ID# 400.) The docket

reflects numerous requests for extensions by Johnson, several of which were granted by both the defendants and the court. (See e.g., Doc. ID# 39, 46, 99, 176, 223, 319.)

Johnson has consistently asked for reconsideration of every order which was not in her favor, whether procedural, evidentiary or on substantive legal issues. (See Doc. ID# 82, 109, 125, 371, 400.) She now seeks to appeal them all. (See Appellant's Brief.) She refuses to accept any prior the ruling of the district court. (See e.g., Doc. ID# 400.) This can be seen through her continued attempts to reargue issues even after they have been decided and when reconsideration of these issues was not properly before the district court. Id. In this appeal, rather than picking out key issues, Johnson reargues 18 issues, which is essentially every district court ruling adverse to her position in this case. (Appellant's Brief at p. 11-16.)

In its Memorandum Decision on the motion in limine, the district court expressed its frustration with Johnson, along with its concern that Johnson did not realize the impact the delays were having on the case. (Doc. ID# 340 at p. 2-3.) The district court refused to grant Johnson's request for an extension to respond, declaring:

[The district court] can no longer tolerate the plaintiff's disregard of the timeliness required under these motions or

other conduct contributing to delay. It has been already necessary to reschedule nearly a 10-day time period to try this action by several months. Not only is that difficult in and of itself in a busy court system in Cass County, but it then ties up the courtroom for other litigation that could otherwise be scheduled in the East Central Judicial District. In the past, this Court has overlooked the plaintiff's failure to meet the timelines required. Particularly, significant delay in prosecuting this action occurred because plaintiff failed to timely file a medical opinion within 90 days as statutorily required. That delay caused by the plaintiff has now merged with other delays traceable to the plaintiff. Without appreciating or respecting the case law and rules of procedure, the plaintiff filed two piecemeal appeals, both of which were dismissed by the appellate court. That in turn caused significant delay in the discovery process. Then, this Court was required to issue an order compelling the plaintiff to produce documents and make herself available for an I.M.E. This and other lack of cooperation compelled the medical defendants to seek a delay in trial and for this Court to amend the Rule 16 trial date and discovery deadlines. Neither the court system nor the parties should need to suffer any further delays and postponements which may result from the request for this extension. Further, as noted by the defendant in its response, the time frame suggested by the plaintiff in allowing a further response would give this Court little time to consider the arguments submitted in any reply brief of the defendants.

I conclude that it is not appropriate to grant the plaintiff's motion for an extension of time to file a response to the motion in limine. For reasons previously stated, no justifiable excuse has been offered for the failure to timely respond. Further, granting the motion would likely contribute to the potential for further delays and jeopardize the ability of the Court and all of the parties to adequately prepare this matter for final trial in May, 2012.

(Doc. ID# 340 at p. 3.)

## **ARGUMENT**

Johnson appeals every procedural, evidentiary and substantive ruling of the district court over the entirety of the case which was adverse to her. (See Appellant's Brief.) She was allowed to brief each issue and in several instances allowed to argue to the district court. When she lost, in almost all instances she filed motions to reconsider those rulings. She lost those as well, and also appeals those rulings. Id. Mottinger timely responded to every motion and stands by his legal positions contained within those responses. The district court did not error as a matter of law and did not abuse its discretion. (See Doc. ID # 381, 382.) The multiple shotgun appeal should be rejected and the district court's rulings should be affirmed.

Mottinger will address a limited number of the issues raised by Johnson on appeal. The main issues for consideration are: whether the motions for summary judgment were properly granted in favor of Mottinger, whether the district court abused its discretion in denying the motion for reconsideration and whether the district court abused its discretion in imposing sanctions against Johnson for failing to make timely disclosures.

**I. The Order Granting Summary Judgment in Favor of Mottinger Should be Affirmed Because Johnson Did Not Make Out a Prima Facie Case Establishing Essential Elements of Her Claims Against Mottinger.**

**A. Standard of Review on Motion for Summary Judgment.**

On appeal, whether a motion for summary judgment was properly granted is a question of law. Spratt v. MDU Res. Group, Inc., 2011 ND 94, ¶ 6, 797 N.W.2d 328. The Court applies a *de novo* standard on the entirety of the record. Id.; Iglehart v. Iglehart, 2003 ND 154, ¶ 9, 670 N.W.2d 343.

“Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no disputed issues of material fact or inferences that can be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Klingle v. Bahl, 2007 ND 13, ¶ 4, 727 N.W.2d 256. If a determination of the disputed facts would not alter the result, summary judgment is also appropriate. Tarnavsky v. Rankin, 2009 ND 149, ¶ 7, 771 N.W.2d 578. The evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must also be drawn in her favor. Id.

The evidence set forward by the party opposing the motion for summary judgment must be both competent and admissible. Spratt, ¶ 7. The party opposing the motion must identify for the Court “the page and line

in the depositions or other comparable documents containing testimony or evidence raising a material factual issue or from which the court may draw an inference creating a material fact issue.” Id. In addition to drawing the Court’s attention to this evidence, the party opposing the motion “must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of diving what facts are relevant or why facts are relevant, let alone material, to the claim for relief. Id. (quoting Tarnavsky v. Rankin, 2009 ND 149, ¶ 8, 771 N.W.2d 578.) “The Court has no duty to scour the record for evidence that would preclude summary judgment.” Spratt, ¶ 7; Iglehart, ¶ 10.

The party opposing the motion must also present sufficient evidence that a reasonable jury could find in their favor. Iglehart, ¶10. Mere speculation or a scintilla of evidence is not sufficient to defeat the motion. Id.

**B. The Motions for Summary Judgment Were Properly Granted in Favor of Mottinger.**

Multiple Motions for Summary Judgment were filed within this case. Mottinger first filed a Motion for Partial Summary Judgment on the cause of action of legal negligence, Count Ten of the Second Amended Complaint. (Doc. ID# 237.) After this motion was filed, Johnson responded, in part, by

asserting additional causes of action against Mottinger. (Doc. ID# 312, 314.) In turn, Mottinger joined the Medical Defendants in a Motion for Summary Judgment on these additional causes of action and also replied to Johnson's arguments within his brief in opposition to her Motion for Summary Judgment.

**1. Summary Judgment Was Properly Granted in Favor of Mottinger on the Issue of Legal Negligence Because Johnson Could Not Establish the Essential Element of Proximate Causation.**

In a claim for legal malpractice, a plaintiff must alleged and prove: (1) the existence of an attorney/client relationship; (2) a duty owed by the attorney to the client; (3) a breach of that duty by the attorney; and (4) damages to the client proximately caused by breaching the duty. Dan Nelson Const., Inc. v. Nodland & Dickson, 2000 ND 61, ¶ 14, 608 N.W.2d 267; Richmond v. Nodland, 501 N.W.2d 759, 761 (N.D. 1993); Wastvedt v. Vaaler, 430 N.W.2d 561, 567 (N.D. 1988).

The duty or standard of care for an attorney in providing professional services is "that degree of skill, care, diligence and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in the State." Wastvedt, 430 N.W.2d at 565. "Generally, expert testimony is necessary to establish the professional's standard of care



(duty) and whether the professional's conduct in a particular care deviated from that standard of care (breach of duty)." Id. (parenthesis original). An exception to the requirement for an expert exists when "the trier-of-fact can adequately evaluate the professional's conduct without expert testimony." Id. Whether an expert is necessary in a particular case is dependent upon the facts and circumstances of the case. Id.

"When it is alleged that an attorney negligently failed to perform some act on behalf of the client, the plaintiff must allege and prove performance of the act would have benefitted the client." Dan Nelson Const., ¶ 14. The "case-within-a-case" doctrine requires that the plaintiff establish that but for the alleged negligence of the attorney a more favorable result would have occurred in the underlying case. Id. The plaintiff must establish (1) the claim that was lost; and (2) also that the attorney's negligence caused that loss. Id. (citing Bye v. Mack, 519 N.W.2d 302, 305 (N.D. 1994)).

In an involuntary commitment proceeding, the petition is initiated in the office of the state's attorney. N.D.C.C. § 25-03.1-08. A probable cause determination is made by the state's attorney before deciding to initiate the process. Id. Another probable cause determination is then made by the

magistrate. N.D.C.C. § 25-03.1-09. The respondent may then be taken into custody only in accordance with the requirements in N.D.C.C. § 25-03.1-25.

A probable cause hearing is held to determine whether a respondent requiring mental health treatment and whether less restrictive alternatives to involuntary commitment were available. See N.D.C.C. 25-03.1-17. Whether a “person requir[es] treatment” is defined in N.D.C.C. § 25-03.1-02(12). The definition for a “person requiring treatment” includes someone who is “mentally ill.” See N.D.C.C. § 25-03.1-02(11)-(12). While probable cause is not a term specifically defined in the scope of involuntary mental health proceedings, see N.D.C.C. Ch. 25-03.1, it is defined in case law. Probable cause exists when:

The facts and circumstances ‘are sufficient to warrant a person of reasonable caution in believing an offense has been or is being committed.’ [K]nowledge of facts sufficient to establish guilt is not necessary to establish probable cause.

State v. Blunt, 2008 ND 135, ¶ 16, 751 N.W.2d 692.

The purpose of the preliminary hearing is not to evaluate the merits of the underlying case, but rather to determine whether the legal standard of probable cause has been established, as a matter of law, to allow the case to proceed forward. In the Interests of R.A., 2011 ND 119, ¶ 7, 779 N.W.2d 332. The district court, as a result of the preliminary hearing, found

probable cause existed despite Mottinger's questioning that appeared to identify that Johnson was not a risk to herself, others or the property of others. (Mott. App. at p. 0022, l.21- p. 0023, l. 5; Mott. App. at p. 0031, l. 22- p. 0032, l. 9.)

In this case, the district court concluded that expert testimony was required on the issue of causation because of the complexity of the case. (Doc. ID# 381 at p. 12.) An analysis of Mottinger's actions in relation to the outcome of the underlying hearing would be necessary to establish the "case-within-a-case." Id.

At the time the motions for summary judgment were being considered, no proposed evidence was offered by Johnson to suggest that if Mottinger had handled the case differently that the outcome of the probable cause hearing would have been more favorable to Johnson. (See Doc. ID# 244, 321.) The only legal expert who was identified by any party to address the issue of causation, at that time, was Attorney Dickson. (See Mott. App. at p. 0043-0063.) Dickson was offered as an expert by Mottinger. Id. He opined to a reasonable degree of legal certainty that Mottinger did not cause damages alleged Johnson. Id. at p. 0044-0045. Because expert testimony was necessary on the issue of proximate causation, and because Dickson was

the only legal expert offered on this issue at the time of the motions for summary judgment, the district court correctly held that Johnson had failed to establish the essential element of proximate causation in her claim against Mottinger for legal malpractice. (Doc. ID# 381 at p. 19-20.)

**2. Summary Judgment Was Properly Granted in Favor of Mottinger on the Other Causes of Action Because Johnson had Identified the Causes of Action Asserted Against Mottinger and Could Not Establish the Essential Elements of the Additional Claims.**

“Judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation.” Dunn v. N.D. DOT, 2010 ND 41, ¶ 10, 779 N.W.2d 628; Ingebretson v. Ingebretson, 2005 ND 41, ¶ 17, 693 N.W.2d 1. Parties are estopped from contradicting sworn statements. Ingebretson, ¶ 17.

Within her Motion for Summary Judgment, Johnson asserted that Mottinger was liable to her for three additional causes of action: false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. (Doc. ID# 244 at p. 35-44.) During her deposition, Johnson had identified that the only cause of action she was asserting against Mottinger was for legal negligence. (Mott. App. at p. 0068,

l. 4-19.) Johnson is judicially estopped from changing her position regarding the allegations against Mottinger.

Even if Johnson had been allowed to make these arguments, Mottinger would still have been entitled to summary judgment on these issues because Johnson failed to establish essential elements necessary for these claims. See Barbie v. Minko Contr., Inc., 2009 ND 99, ¶ 6, 766 N.W.2d 458. Johnson did not provide evidence of the elements of “unlawfulness” or “intent” necessary to establish the cause of action for false imprisonment. See Heib v. Lehrkamp, 2005 SD 98, ¶ 21, 704 N.W.2d 875; Dupler v. Seubert, 230 N.W.2d 626, 631 (Wis. 1975). Johnson failed to provide evidence that she suffered “bodily harm,” necessary to establish her claim for negligent infliction of emotional distress. See Hougum v. Valley Mem’l Homes, 1998 ND 24, ¶ 29, 574 N.W.2d 812. And finally, Johnson failed to provide evidence that Mottinger “intentionally or recklessly” intended her to experience emotional distress, necessary for her claim for intentional infliction of emotional distress. See Muchow v. Lindblad, 435 N.W.2d 918, 923 (N.D. 1989).

Johnson’s failure to address these essential elements was cited by the district court in its decision to deny Johnson’s Motion for Summary

Judgment against Mottinger. (Doc. ID. #381 at p. 20-24.) In light of the doctrine of judicial estoppel and given Johnson's failure to address these essential elements of these causes of action, the district court's order granting summary judgment in favor of Mottinger with respect to these three additional causes of action should be upheld as a matter of law. (Doc. ID# 381.)

## **II. The District Court Did Not Abuse its Discretion in Denying Johnson's Motion for Reconsideration.**

After the district court had decided the motions for summary judgment, Johnson submitted a motion for reconsideration. (Doc. ID# 399, 400.) The district court denied her motion. (Doc. ID# 445.)

"A trial court's decision on a Rule 60(b) motion for relief is within the trial court's sound discretion and will not be overturned absent an abuse of discretion. Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90. A trial court abuses its discretion when it acts in an "arbitrary, unconscionable or unreasonable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." Id.

As stated this Court stated in Follman:

Under Rule 60(b), a decision to submit only certain evidence at a stage in the proceedings generally cannot later constitute exceptional circumstances justifying relief from a judgment. A Rule 60(b) motion is not to be used to relieve a party from free, calculated, and deliberate choices. Such mere misjudgment or careless failure to evaluate does not suffice. A party remains under a duty to take legal steps to protect his own interests.

Id. ¶ 11.

In support of her motion for reconsideration, Johnson submitted a new affidavit from Attorney Runge. (Doc. ID# 401; cf. Doc. ID# 247 at p. 122, l. 18 – p. 123, l. 17.) In Runge’s new affidavit, he changed his position regarding causation from what he had previously stated during his deposition, all in light of the analysis and ruling of the district court. (See Doc. ID# 401.) Within her briefing on the motion, Johnson failed to provide any rational why Runge’s affidavit was being submitted at that time or why such testimony could not have been submitted along with the motions for summary judgment. (See Doc. ID# 400, 441.) Johnson also did not identify the legal basis under Rule 60(b) for bringing her motion for reconsideration as it related to Mottinger. (See Doc. ID# 400, 441.)

The district court declined to consider this new affidavit because Johnson did not provide any reasons within her briefing on the motion for reconsideration why Runge’s affidavit could not have been submitted earlier

in the proceedings. (Doc. ID# 445 at p. 3.) Johnson also did not meet her burden of providing a legal basis under Rule 60(b), N.D.R. Civ. P., for disturbing the finality of the judgment. Id.

The district court correctly stated within its Memoranda Decision that a motion for reconsideration under Rule 60(b) cannot be used “to provide a litigant with a second chance to present new explanations, legal theories or proof to a court.” Id. (quoting Watts v. Magic 2 Times 52 Mgmt., Inc., 2012 ND 99, ¶ 11, 816 N.W.2d 770). By submitting the new expert affidavit after the motions for summary judgment had already been decided, this is exactly what Johnson was attempting to do. (See Doc. ID# 400, 401.) The district court did not abuse its discretion in denying Johnson’s motion for reconsideration. (See Doc. ID# 445.)

Within the Appellant’s Brief, Johnson again relies extensively on this affidavit; however, she does not argue that the district court abused its discretion in denying the motion for reconsideration. (See Appellant’s Brief.)



### **III. The District Court Was Within its Discretion to Impose Sanctions for Johnson's Failure to be Timely With Her Disclosures.**

Several of the issues raised by Johnson within her appellate brief resulted from her failure to follow timing requirements. (See, e.g., Doc. ID# 382.) The district court imposed these orders based on the rules in an effort to encourage prompt filings and to promote judicial economy in this case. See id. Johnson reargued these issues numerous times throughout the proceedings in an exhaustive amount of briefing. The district court considered timing requirements in its rulings on the motions and acted within its discretion in ruling against Johnson.

Under Rule 26(b)(4)(A), N.D.R. Civ. P., a party is entitled to know who the opposing party is calling as an expert witness at trial, the content of their anticipated testimony and the basis for their opinions. These disclosures are required to be made in accordance with the Rule 16 Scheduling Order. See N.D. R. Civ. P. 16(c)(2). Pursuant to Rule 16(h), N.D.R. Civ. P., the district court “may issue any just orders, including those authorized by Rule 37, if a party or its attorney: . . . (C) fails to obey a scheduling or other pretrial order.” If the deadlines for the expert disclosures are not followed, the district court may, within its discretion, prohibit “the disobedient party from . . . introducing designated matters into

evidence.” N.D.R. Civ. P. 37(b)(2). The district court’s imposition of a discovery sanction is reviewed under an abuse of discretion standard. Dewitz v. Emery, 508 N.W.2d 334, 339-40 (N.D. 1993).

Additionally, it is within the district court’s discretion to control its docket. See Gullickson v. Kline, 2004 ND 76, ¶ 15, 678 N.W.2d 138; Ward v. Shipp, 340 N.W.2d 14, 18 (N.D. 1983). The district court should be mindful in exercising its discretion to do so in a manner that “comports with substantial justice.” Gullickson, ¶ 15. A balancing of the interests of judicial economy and convenience should be made against the parties’ right to present all of its evidence on the relevant issues. Id.; Ward, ¶ 18.

On September 28, 2010, a Rule 16 Scheduling Order and Order for Jury Trial was issued in this case. (Doc. ID #141.) The Rule 16 Scheduling Order was modified on May 20, 2011. (Doc. ID #228.) The modified Rule 16 Scheduling Order required Johnson to designate all of her expert witnesses for trial by July 1, 2011. See id. Prior to that time, on January 14, 2011, Johnson had submitted a designation of expert witnesses. (Doc. ID #152.) On July 1, 2011, she updated that information by submitting an amended designation of expert witnesses. (Doc. ID #172.) Johnson, herself,

was not listed as an expert witness on either of the expert witness disclosures. (Doc. ID #152, 172.)

Because Johnson was not listed on either of the expert witness disclosures, the district court identified this as a sufficient reason, in and of itself, to grant Mottinger's motion in limine. (Doc. ID# 382 at p. 3.) The district court identified that Johnson's failure to make this disclosure would likely require additional discovery on Mottinger's behalf and further delays in proceeding with this case. Id. The district court also found that Johnson lacked sufficient foundation under Rule 702, N.D.R. Evid., to qualify as a legal expert to testify on the matters at issue within this case. Id. at p. 4.

The district court's ruling on the motion in limine precluding Johnson from being considered a legal expert for purposes of this case should be upheld because the district court did not abuse its discretion in precluding Johnson from testifying as a legal expert within this case.

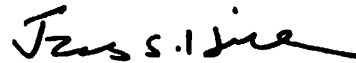
## **CONCLUSION**

For the above-mentioned reasons, Mottinger respectfully requests this Court affirm the ruling of the district court granting summary judgment to Mottinger on all allegations asserted against him by Johnson and affirm the denial of Johnson's motion for summary judgment because Johnson failed to establish evidence of essential elements of her causes of action.

Mottinger also respectfully requests the Court to find that the district court did not abuse its discretion in denying Johnson's motion for reconsideration and, with respect to the rulings on the motion in limine, in precluding Johnson from testifying as a legal expert in this case.

Dated this 19<sup>th</sup> day of November, 2012.

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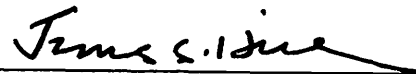
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### CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Defendant/Appellee Steven Mottinger in the above referenced matter, and as the authors of the above brief, hereby certify, in compliance with Rule 28(g), N.D.R.Civ.P., that the above Brief was prepared with proportional type face and that the total number of words, excluding words in the table of contents and table of authorities, total 9,881.

Dated this 19<sup>th</sup> day of November, 2012.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Carol J. Johnson,	)	Supreme Court No. 20120239
	)	
Plaintiff/Appellant,	)	District Court No. 09-2009-C-2892-1
	)	
-vs-	)	
	)	
Natalya Bronson, M.D.; Prairie	)	
St. John's Fargo, LLC, dba	)	
Prairie St. John's Hospital;	)	
B.R. Clark, R.N., Steven	)	
Mottinger; John Does 1-100;	)	
Jane Does 1-100,	)	
	)	
Defendants/Appellees.	)	

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**AFFIDAVIT OF MAILING**

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The undersigned, being duly sworn, deposes and says that: I am a United States citizen, over 18 years of age, and on November 19, 2012, I served a copy of the attached:

**1. BRIEF OF DEFENDANT/APPELLEE STEVEN MOTTINGER**

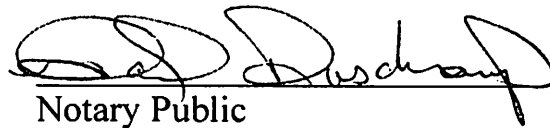
by placing a true copy in a postage paid envelope addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States Mail at Bismarck, North Dakota.

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Fargo, LLC, dba Prairie St. John's  
Hospital, and B.R. Clark, R.N.

  
Lydia Carver

Subscribed and sworn to before me, today, November 19, 2012.

  
Notary Public

